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UNAUTHORIZED PRACTICE OF LAW IN THE U.S.: A SURVEY AND BRIEF ANALYSIS OF THE LAW

by

Victor D. Lopez*

INTRODUCTION

The practice of law is limited in the United States in every jurisdiction to attorneys who are admitted to practice and are in good standing with the state bar. To date, attacks on the validity of the general prohibition against the unauthorized practice of law (UPL) by individuals found guilty of unauthorized practice have been found to be without merit.¹ "The purpose of prohibiting the unauthorized practice of law is to protect the public from incompetence in the preparation of legal documents and prevent harm resulting from inaccurate legal advice."² It is doubtless true as one court noted that the "amateur at law is as dangerous to the community as an amateur surgeon would be."³ Some critics, however, observe that the prohibition against UPL has more to do with protecting the profession from competition than with protecting the public.⁴ The same holds true for other professions that require licensure. The medical profession is an obvious example. But we do not generally consider it a

criminal offense for an unlicensed person to give an aspirin to a friend with a headache, or treat a child's scraped knee with an over the counter antibiotic cream and a band aid. When it comes to the practice of law, however, the general rule is zero tolerance for every instance that qualifies as unauthorized practice, including the giving of advice to a friend free of charge (even if the advice is accurate and no harm is done).

H. CONDUCT THAT CONSTITUTES UNAUTHORIZED PRACTICE OF LAW

Every state permits an individual to act as his or her own legal representative without running afoul of restrictions against UPL. One may generally appear *pro se* before federal and state courts and agencies, conduct legal research and interpret the law for one's own use, execute binding documents and agreements across a wide range of areas. No one, however, other than a member of the bar in good standing in any state may engage in activities that constitute the practice of law for anyone other than him or herself with enumerated exceptions provided by statute or by the common law in each state.⁵ Comprehensive, consistent definition of the types of activities that constitute UPL is not available in all states. Moreover, finding the permissible exceptions to the general UPL prohibition in each state is not a simple matter for the average lay person.

The practice of law includes "the doing or performing services in a court of justice, in any matter depending therein, throughout its various stages . . . but in a larger sense it includes legal advice and counsel . . ." ⁶ Representing an individual or a corporation in court constitutes the practice of law, as does the "the preparation of pleadings and other papers incident to actions and special proceedings and the

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management of such actions and proceedings on behalf of clients before judges and courts."⁷ The definition of UPL is broad enough to embrace "all advice to clients and all action taken for them in matters connected with the law."⁸ It "includes giving legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are preserved."⁹ As a result, absent a state statute or case law to the contrary, every time that an individual represents another in court, provides guidance to another as to the law, helps with the preparation of contracts or other instruments that convey legal rights, the unauthorized license of law is involved with sanctions that may include significant fines and jail time. That a fee is not charged or that the advice given is accurate will not exempt liability for UPL under state statutes. Although current data on national and regional average hourly rates charged by lawyers is hard to come by, one recent survey of 250 national firms found the average rate charged by these firms was \$372 per hour.¹⁰ And while legal representation is provided by the state to criminal defendants who cannot afford to hire legal counsel, legal advice in civil matters with potentially grave consequences is generally unavailable, leaving persons in need of such assistance in the unenviable situation of having to find legal counsel willing to represent them *pro bono* or having to represent themselves.

The problem is exacerbated when as is often the case a jurisdiction makes no effort to define actions that constitute the practice of law, which leaves the broadest possible prohibition on not only representing others before tribunals or agencies, something anyone would understand to be the practice of law, but also the giving of legal advice or counsel on any matter that involves the interpretation or application of the law. That is by no means something that the average citizen would understand to constitute UPL. When a state

attempts to clarify and codify acts that constitute unauthorized practice, citizens are given notice as to what specific conduct is prohibited. The Texas UPL statute provides a good example. Texas punishes as a crime the unauthorized practice of law for personal gain¹¹ (e.g., if some benefit is derived by the person engaging in UPL) and then only under specific instances enumerated in the statute, including contracting to represent that person with regard to personal causes of action for property damages or personal injury, advising anyone as to the person's rights and the advisability of making claims for personal injuries or property damages, or as to accepting offered settlement of claims for personal injuries or property damages, entering into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action, or entering into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.¹² Texas courts would still presumably be able to issue injunctions to prevent even the gratuitous engagement in these activities. In states other than Texas, however, that punish UPL as crimes or by civil penalties whether or not a benefit is derived by the person engaged in the UPL, any of the foregoing activities would be punishable whether or not a fee is charged or the person engaging in the UPL derives any other benefit.

Unfortunately, Texas is the exception and not the rule and most states offer little specific guidance as to the nature of conduct that is punishable as UPL. The giving of legal advice and interpretation of the law are reserved to members of the bar in good standing in all jurisdictions, though the punishment for those who violate the rule varies widely across the United States. Activities that would not necessarily

be understood by the average person to constitute UPL abound across the United States, while others that would appear to be clear instances of UPL are perfectly permissible. Thus, in New York "providing information documents and overview documents to debtors also constitutes the unauthorized practice of law because the documents serve to simplify the bankruptcy process which leads to the preparer exercising his or her judgment as to how best to accomplish that result and gives potential debtors guidance and advice on how to fill out the forms."¹³ But tax preparers who use their own judgment on what tax forms to use and what deductions clients are entitled to base on information provided for them

by the clients and on their interpretation of the federal and state tax laws are not generally guilty of UPL.¹⁴ On a similar vein, self-help products including form books and computer software intended to allow consumers to produce their own legally binding documents are exempt from UPL charges in many states¹⁵ at least as long as such products are generic and not specifically tailored to the needs of a specific person.¹⁶ Thus, providing fill in the blank forms for customers is fine in most states, but problems arise if, for example, an online or software package makes decisions for a customer based on an artificial intelligence or decision tree system based on answers to specific questions. This, of course, is precisely how tax preparation programs work. A similar model for, say, will preparation package where a user is prompted for information and the program then decides what type of will is appropriate and what tailored clauses to add depending on input from the "client" would probably constitute UPL. In effect, providing forms and allowing the client to fill in the blanks themselves is fine, but explaining the law or giving advice as to which forms to use to assist the customer in filling the forms probably constitutes UPL. And what about document preparation services such as LegalZoom.com? The service states on its home page that it was "developed by

expert attorneys with experience at the most prestigious law firms in the country" and features a photograph of Robert Shapiro, one of its co-founders.¹⁷ Shapiro has also appeared regularly on television commercials for the service. The service also makes available an Education Center that "allows you to access the information you need to research your legal questions and make informed decisions. With our education center, you have access to Legal Topics, Frequently Asked Questions, Glossary Terms and Non-Legal Resources."¹⁸ It certainly looks and sounds as though consumers may be getting legal advice while using this service. However, the information provided, while specific, is not tailored to the individual user, and the service provides a disclaimer that states in part, "The information provided in this site is not legal advice, but general information on legal issues commonly encountered. LegalZoom's Legal Document Service is not a law firm and is not a substitute for an attorney or law firm. LegalZoom cannot provide legal advice and can only provide self-help services at your specific direction."¹⁹ A link to a more extensive disclaimer²⁰ is also provided from the services home page. Although this is a for-profit service that offers assistance with both simple matters, such as the filing of a DBA certificate and highly complex ones, like patent filings, LegalZoom and similar services have thus far largely escaped significant scrutiny or UPL sanction even though their services are accessible in every state.²¹

III. SANCTIONS AGAINST THE UNAUTHORIZED PRACTICE OF LAW IN U.S. JURISDICTIONS

This paper will now turn to a brief examination of the specific sanctions against the unauthorized practice of law in the various U.S. jurisdictions. The following table provides a brief overview of the sanctions provided by the various

jurisdictions in the United States as a means of preventing and punishing unauthorized practice (See Table I). The table clearly illustrates the lack of uniformity in punishing UPL in the various jurisdictions which ranges from civil damages punishable only by a fine in Arizona, Ohio and Utah through felony classification for certain instances of UPL in Arkansas, Florida, Louisiana, Mississippi, Nevada, Rhode Island, Texas and Washington State.²²

Table I: Unauthorized Practice of Law Sanctions by Jurisdiction

Jurisdiction	Offense
Alaska	Class A misdemeanor
Alabama	Misdemeanor ²⁴
Arkansas	Misdemeanor, ²⁵ if a first offense, and a Class D felony if the defendant has been previously convicted of the offense of unauthorized practice of law. ²⁶
Arizona	No criminal sanctions.- Provides civil sanctions only. ²⁸
California	Misdemeanor "punishable by up to one year in a county jail or by a fine of up to one thousand dollars (\$1,000), or by both a fine and imprisonment. ²⁹
Colorado	Contempt of court. ³⁰
Connecticut	Misdemeanor that can result in a fine of "not more than two hundred and fifty dollars or imprisoned not more than two months or both." ³¹
Washington D.C.	Contempt of court. ³²
Delaware	Cease and desist orders may be issued by the Board on the Unauthorized Practice of Law. ³³ Persons found guilty of unauthorized practice of law can be assessed the costs of the investigation by the Board. ³⁴
Florida	Third degree felony. ³⁵ A third-degree felony in Florida is punishable by imprisonment not to exceed five years. ³⁶

Georgia	Misdeme
Guam	Contempt of court. ³⁸
Hawaii	Misdemeanor. ³⁹
Iowa	Injunction. ⁴⁰
Idaho	Misdemeanor.
Illinois	Contempt of court. ⁴²
Indiana	Class B misdemeanor.'
Kansas	Contempt of court. ⁴⁴
Kentucky	Contempt of court. ⁴⁵
Louisiana	Felony. (The maximum penalty for unauthorized practice is a \$1,000 fine and/or imprisonment for up to two years.) ⁴⁶
Maine	Misdemeanor. ⁴⁷
Massachusetts	Contempt of court. ⁴⁸
Maryland	Misdemeanor. ⁴⁹
Michigan	Contempt of courts ^o
Minnesota	Misdemeanors'
Mississippi	Misdemeanor for a first offense or a felony for second and subsequent offenses. ⁵²
Montana	Contempt of court. ⁵³
North Carolina	Misdemeanor. ⁵⁴
North Dakota	Misdemeanor. ⁵⁵
Nebraska	Misdemeanor. ⁵⁶
New Hampshire	Injunction. ⁵⁷
New Jersey	Misdemeanor. ⁵⁸
New Mexico	Misdemeanor. ⁵⁹
Nevada	Misdemeanor, gross misdemeanor or felony. ⁶⁰
New York	Misdemeanor. ⁶¹
Ohio	Civil penalties up to --1.6-,(----(2)00.)
Oklahoma	Contempt of court. '-
Oregon	Injunction. ⁶⁴
Pennsylvania	Misdemeanor."
Puerto Rico	Misdemeanor. 6 7 -
Rhode Island	Misdemeanor for first offense, felony for subsequent offenses. ^o
South Carolina	Contempt of court. ⁶⁸
South Dakota	Permanent injunction. ⁶⁹
Tennessee	Class A misdemeanor. ⁷⁰
Texas	Class A misdemeanor or Third Degree felony. ⁷¹
Utah	Civil penalties. ⁷²

Virginia	Class I misdemeanor. ⁷³
Virgin Islands	Injunctive relief, fine.
Vermont	Injunctive relief, fine, misdemeanor. ⁷⁵
Washington	Gross misdemeanor or class C felony. ⁷⁶
Wisconsin	Misdemeanor. ⁷⁷
West Virginia	Misdemeanor. ⁷
Wyoming	Criminal contempt. ⁷⁹

The American Bar Association's Standing Committee on Client Protection sent out a survey in 2009 to unauthorized practice of law committees in all jurisdictions in an attempt to compile data on the various jurisdictions' laws and enforcement efforts in the area of UPL.⁸⁰ The results of that survey were released in May 2009⁸¹ with the following findings:

- 39 jurisdictions responded while 12 (Georgia, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, Rhode Island, South Carolina and Vermont) did not respond;⁸²

The majority of responding jurisdictions have definitions for both the "practice of law" and the "unauthorized practice of law." "Practice of law" definitions are established by court rule, by statute, through case law, and through advisory opinions, with some jurisdictions having definitions in more than one resource;⁸³

Twenty-nine jurisdictions actively enforce UPL regulations, although some jurisdictions indicate that insufficient funding makes enforcement difficult. Six jurisdictions stated that enforcement is inactive or non-existent;⁸⁴

Enforcement in most jurisdictions is funded through Bar Association dues, and only four states, Florida,

Ohio, Tennessee, and Texas, provide significant funding for UPL enforcement (Florida provides the most funding at approximately \$1.6 million annually);⁸⁵

Twelve jurisdictions responded that they expect changes in UPL in the coming year, including adopting additional rules, participating in undercover "sting" operations to investigate complaints, more active enforcement, an increased budget for enforcement, changes in the procedures for enforcement, adoption of specific rules to define non-lawyer practice areas (WA) and increasing penalties for UPL.⁸⁶

The lack of clear standards in defining or punishing UPL in state statutes coupled with the uneven enforcement of these statutes make it difficult for average citizens and professionals to know what unauthorized practice of law is or to predict what consequences, if any, will befall those who violate the UPL restrictions. This is the case even regarding conduct that professionals may, with some justification, believe to be safe, such as a CPA's tax practice.⁸⁷ The American Law Institute (ALI) has not defined UPL, perhaps because it cannot furnish one restatement of its definition given many state courts' vague applications of UPL statutes, and ALI has also noted that "definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague or conclusory."⁸⁸ This confusion regarding what constitutes UPL is one of the major obstacles to effective enforcement of the rule against UPL.⁸⁹

IV. ARE CURRENT SANCTIONS AND THEIR ENFORCEMENT EQUITABLE?

Under our common law system, the lack of uniformity

among the various jurisdictions in regard to UPL is not something that of itself should raise concern. States are, after all, in the best position to decide in the exercise of their broad police powers what sanctions to apply to protect their citizens from the danger posed by those who practice law without a license. The offense need not be treated equally in all states any more than is any other conduct deemed to be harmful to the health, safety or general welfare of citizens in any given jurisdiction. The wide variance in the severity of sanctions among the jurisdictions, however, does raise questions of fairness, as does the disparity in enforcement of UPL restrictions among the states.

If there is any truth to the old saying that lawyers who represent themselves have fools for clients, what hope is there for the average person left to learn the procedural and substantive law necessary to competently represent themselves even with regard to routine legal matters such as the purchase or sale of a home, the drafting of a will or the filing of an uncontested divorce? Protecting the public from unlicensed practitioners who misrepresent themselves as attorneys is clearly in the public interest, as is the prevention of even competent representation from those who are

unlicensed and illegally charge clients fees for legal advice or representation that only members in good standing of the bar are qualified to provide. If experienced lawyers can find it challenging to avoid charges of UPL when advising clients on legal issues outside of jurisdictions in which they are admitted to practice, how can the average lay person be expected to know the limits of permissible conduct in giving their opinion on legal matters to others or in helping others create legally binding documents?

V. CONCLUSION

The striking differences among the various U.S. jurisdictions regarding the definition of UPL, the criminal and civil sanctions available to protect the public from those who practice law without a license and the wide disparity in enforcement of UPL, violations among the states all help to provide an environment that can only breed confusion and raise serious issues of basic fairness that should be addressed at a national level. At the very least, consensus should be reached as to what constitutes the practice of law and on what are appropriate sanctions to protect the public against those who would prey upon them by practicing law without having met the education, competence or ethical standards that are the prerequisites to bar admission. How unauthorized practice is defined has a direct impact on the availability and cost of legal services.⁹⁰ In 2002, the Task Force on the Model Definition of the Practice of Law of the American Bar Association proposed a Draft Definition of the Practice of Law that states can use as a model.⁹¹ Other groups, such as the National Conference of Commissioners on Uniform State Laws (NCCUSL), could also study the feasibility of creating a uniform definition of unauthorized practice of law that the various jurisdictions could consider for adoption. As technology continues to advance and information about the law (both reliable and unreliable) becomes ever more accessible to the average person, and as increasingly powerful computer hardware and sophisticated artificial intelligence systems can easily be adapted to assist users to practical application of the law well beyond mere document preparation, having a clear definition of UPL in every state will become even more crucial.

Unsuccessful arguments include violation of First Amendment rights (*People v. Shell*, 148 P.3d 162; 2006 Colo. LEXIS 980, (Colo. 2006)), and alleged violation of federal antitrust laws, due process or equal protection (*Lawline v. American Bar Association*, 956 F.2d 1378; 1992

U.S. App. LEXIS 2642 (7th Cir.1992).

² *Franklin v. Chavis*, 371 S.C. 527, 532 (S.C. 2007).

³ *In re: Baker*, 8 N.J. 321, 338, 85 A.2d 505 (N.J. 1951).

⁴ See, e.g., Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Problems, 34 Stan. L. Rev. 1 (1981); Barlow F. Christensen, The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors--or Even Good Sense?, 1980 Am. B. Found. Res. J. 159 (1980).

⁵ Alabama law, for example, provides that:

Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which

acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or

corporation in support of its title policies, to be retained in its files and not to be recorded. Code of Ala. § 34-3-6 (c) (2010). Similar provisions are included in many states' UPL statutes, with additional specific provisions also commonly provided in separate statutes that delineate the types of activities that certain professionals may legally engage in without violating UPL provisions. O.C.G.A. § 15-19-53 (2009), for example, allows person, corporation, or voluntary association in Georgia to examine the record of titles to real property, and to prepare and issue abstracts of title from such examination and certify the correctness of the same without violating UPL provisions but permits only attorney at law to express, render, or issue any legal opinion as to the status of the title to real or personal property. And Texas excludes from the definition of unauthorized practice of law "the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney." (Tex. Gov't Code § 81.101 (c) (2009)).

⁶ *Fink et al. v. Peden*, 214 Ind. 584, 589, 17 N.E.2d 95, 96 (IN 1938).

⁷ *Richland County Bar Association v. Clapp*, 84 Ohio St. 3d 276, 278; 703 N.E.2d 771, 772.

⁸ *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W.2d 34, 41 (Tex. App.--Dallas 1987).

⁹ *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 28, 1 Ohio Op. 313, 315, 193 N.E. 650, 652 (OH 1934); *Akron Bar Assn. v. Miller*, 80 Ohio St. 3d 6, 7, 684 N.E.2d 288, 290 (OH 1997).

¹⁰ 2009 Law Firm Billing Survey, The National Law Journal, December 7, 2009 available at <http://www.law.com/lj/sp/nlj/PubArticleNLI.jsp?id=1202436068099&slretum-1&hbxlogin-1> (Last visited November 14, 2010).

¹¹ See *infra* at note 71.

¹² *Id.*

¹³ *Adams v. Giordano (In Re Clarke)*, U.S. Bankr. Ct. East. Dist. N.Y., 2009 Bankr. LEXIS 1363, at *22 (2009).

¹⁴ Tax preparation is a hybrid of accounting and law. Federal regulations permit anyone to be a tax preparer without regard to professional qualifications or professional status (See Treas. Reg. § 301.7701-15(d) (1980)). The states cannot treat routine tax preparation permissible under federal law as UPL. But the issue is by no means settled as to where to draw the line between permissible tax advice and impermissible UPL. (See generally Matthew A. Melone, *Income Tax Practice and Certified Public Accountants: The Case for a Status Based Exemption from State Unauthorized Practice of Law Rules*, 11 Akron Tax J. 47 (1995), Stephen T. Black and Katherine D. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 St. Mary's L.J. 1 (2004)).

¹⁵ Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 Stan. L. Rev. 1689, 1724 (2008).

¹⁶ *Id.*

¹⁷ <http://www.legalzoom.com> (Last visited November 14, 2010).

¹⁸ <http://www.legalzoom.com/education-center/education-center-index.html> (Last visited November 14, 2010).

¹⁹ <http://www.legalzoom.com> (Last visited November 14, 2010).

²⁰ <http://www.legalzoom.com/disclaimer-popup.html> (Last visited November 14, 2010).

²¹ As of this writing, there is a case pending in Missouri involving a class action suit against LegalZoom.com. (See *Janson v. LegalZoom.com, Inc.* (No. 10-04018 (W.D. Mo. petition for removal filed February 5, 2010)). A second class action suit is currently also pending in Superior Court of California, LA County, against LegalZoom.com (See *Webster v. LegalZoom.com* (No. BC438637. A copy of the complaint is available at <http://www.elderlawanswers.com/Resources/Documents/Legal%20Zoom%20Webster%20complaint.pdf>). (Last visited November 15, 2010).

²² In instances where a state does not classify the offense as a felony or misdemeanor, I have used the traditional classification of a felony as any crime that carries a maximum sentence of not less than one year and classified criminal offenses that provide up to one-year incarceration as a maximum penalty as misdemeanors. (See, e.g., Model Penal Code Art. 6., §6.06, American Law Institute (1962).

²³ Alaska Stat. § 08.08.230 (a) (2009).

²⁴ Code of Ala. § 34-3-7 (2009).

²⁵ Ark. Code § 16-22-501 (c) (2009).

²⁶ Ark. Code § 16-22-501 (d) (2009).

²⁷ Arizona defines what conduct constitutes the practice of law [Ariz. Sup. Ct. R. 31 (a)(2)(A) (2009)], what conduct constitutes unauthorized practice of law [Ariz. Sup. Ct. R. 31 (a) (2)(B)], and limits the practice of law to active members of the state bar [Ariz. Sup. Ct. R. 31 (b) (2009)]. But only civil sanctions are provided for those found to have engaged in the unauthorized practice of law.

²⁸ Cease and desist orders are available under Ariz. Sup. Ct. R. 76 (h) (2)(2009), as well as injunctions [Ariz. Sup. Ct. R. 76 (b) (3)(2009)]. Contempt of court would be the only punishment available against an individual who violates cease and desist orders or injunctions of the Arizona courts.

²⁹ Cal Bus & Prof Code § 6126 (a) (2009). A second offense is punishable by a minimum sentence of 90 days in county jail under the same Code section. *Id.*

³⁰ C.R.S. 12-5-112 (2009).

³¹ Conn. Gen. Stat. § 51-88 (b)(2008).

³² D.C. Ct. App. Rule 49 (e) (2) (2009).

³³ Del. Sup. Ct. R. 86 (c) (6) (2009).

³⁴ Del. Sup. Ct. R. 86 (c) (5) (2009).

³⁵ Fla. Stat. § 454.23 (2009).

³⁶ Fla. Stat. § 775.082 (3) (d) (2009).

³⁷ O.C.G.A. § 15-19-56 (2009). Acts that are criminalized as the unauthorized practice of law in the State of Georgia are defined in O.C.G.A. § 15-19-51 (2009).

³⁸ 7 GCA § 9A106 (2009).

³⁹ HRS § 605-14 (2009) prohibits the unauthorized practice of law and HRS § 605-17 (2009) makes HRS § 605-14 (2009) punishable as a misdemeanor.

⁴⁰ Iowa Ct. R. 37.2 (2009).

⁴¹ Idaho Code § 3-420 (2010). The maximum penalty under the statute is a \$500 fine and/or six months imprisonment. *Id.*

⁴² 705 ILCS 205/1 (2010). Remedies under the statute include equitable relief (e.g., injunctions), a civil penalty not to exceed \$5,000 (payable to the Illinois Equal Justice Foundation), and actual damages.

⁴³ Burns Ind. Code Ann. § 33-43-2-1 (2009).

⁴⁴ The Kansas statute defines the unauthorized practice of law as either practicing law in a jurisdiction where doing so violates the regulation

of the legal profession in that jurisdiction or assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. KRPC 5.5 (a) (2009). While the unauthorized practice of law by non-lawyers is not specifically addressed, injunctive relief and contempt of court sanctions would be available as a matter of course to prevent anyone from engaging in the unauthorized practice of law in the state. In addition, holding oneself out to be an attorney is a class B misdemeanor. K.S.A. § 21-3824 (a) (2008). Claiming to be a lawyer when one is not is sufficient for a conviction of false impersonation (*State v. Marino*, 23 Kan. App. 2d 106, 929 P.2d 173 (1996)), as is using letterhead by a suspended attorney that identified him as an "Attorney and Counselor at Law" (*State v. Seek*, 274 Kan. 961; 58 P.3d 730; 2002 Kan. LEXIS 773 (2002)).

⁴⁵ Ky. SCR Rule 3.460 (1) (2009).

⁴⁶ Ky. SCR Rule 3.460 (C) (2009).

⁴⁷ 4 M.R.S. § 807 (2) (2009) makes the unauthorized practice of law a Class E crime. 17-A M.R.S. § 1252 (2) (E) (2009) makes Class E crimes punishable by up to six months incarceration (e.g., a misdemeanor). In addition, 17-A M.R.S. § 1301 (1) (E) (2009) allows a maximum fine for Class E crimes to be set at \$1,000.

⁴⁸ Massachusetts law provides: "No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law, or, by word, sign, letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law; provided, that a member of the bar, in good standing, of any other state may appear, by permission of the court, as attorney or counselor, in any case pending therein, if such other state grants like privileges to members of the bar, in good standing, of this commonwealth." ALM GL ch. 221, § 46A (2009). Although sanctions for violation of this section are not specifically provided in the statute, injunctive relief and contempt of court proceedings would be available as a matter of course for anyone found to be engaging in the unauthorized practice of law in violation of the statute. In addition, holding oneself out as an attorney by a disbarred or suspended attorney or by a non-attorney can result in a misdemeanor conviction with a maximum penalty of \$100 or imprisonment of not more than six months for a first offense and a \$500 fine or imprisonment for up to one year for subsequent offenses under ALM GL ch. 221, § 41 (2009).

⁴⁹ Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 10-601 (a) (2009) prohibits the practice of law by anyone not admitted to the bar, and Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 10-606 (a) (3) (2009) makes engaging in the practice of law without bar admission a misdemeanor punishable by a maximum fine of \$5,000 and/or up to one year imprisonment. Corporations, partnerships or other business associations engaged in the unauthorized practice of law are subject to a maximum fine of \$5,000 (Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 10-606 (a) (1) (2009)) and any officer, director, partner, trustee, agent, or employee who acts to enable a corporation, partnership, or association to engage in the unauthorized practice of law is also guilty of a misdemeanor and subject to a maximum fine of up to \$5,000 and/or imprisonment for up to one year (Md. BUSINESS OCCUPATIONS AND PROFESSIONS Code Ann. § 10-606 (a) (2) (2009)).

⁵⁰ MCLS § 600.916 (1) (2009).

⁵¹ Minn. Stat. § 481.02 (Subd. 1) (a) (2009).

⁵² Miss. Code Ann. § 73-3-55 (2009). Miss. Code Ann. § 97-23-43 (2009) sets the punishment for unauthorized practice of law at a minimum of \$100 and maximum of \$200 or by imprisonment from three to 12 months for a first offense. A second offense is punishable by a fine of not less than \$200 or more than \$500 or imprisonment of not less than one year to not more than two years. Subsequent offenses after the second offense will result in fines not to exceed \$5,000 or imprisonment of not more than five years.

⁵³ Mont. Code Anno., § 37-61-210 (2009). The penalty for practicing without a license in Montana is limited to persons who practice "law in any court, except a justice's court or a city court, without having received a license as attorney." (But see *In re Bailey*, 50 M 365, 146 P 1101 (1915) holding that a person who advises clients in legal matters pending or to be brought before a court of record, prepares pleadings or proceedings for use in a court of record, or appears before a court of record, is practicing law in a court of record and, is guilty of contempt of court if he is not licensed to practice law in the state.)

⁵⁴ N.C. Gen. Stat. § 84-4 (2009) prohibits the unauthorized practice of law and N.C. Gen. Stat. § 84-8 (2009) makes the violation of N.C. Gen. Stat.

§ 84-4 (2009) a Class 1 misdemeanor.

⁵⁵ N.D. Cent. Code, § 27-11-01 (2009) makes engaging in the unauthorized practice of law a Class A misdemeanor.

⁵⁶ R.R.S. Neb. § 7-101 (2009) makes the unauthorized practice of law a Class III misdemeanor. (Neb. Ct. R. § 3-1018 (A) (2009) also specifically gives the Supreme Court of Nebraska the power to enjoin the unauthorized practice of law.)

⁵⁷ RSA 311:7-a (2009).

⁵⁸ N.J. Stat. § 2C:21-22 (a) (2009) makes to knowingly engage in the unauthorized practice of law a "disorderly persons offense" (a misdemeanor). But unauthorized practice of law is a "crime in the fourth degree" (a felony) if a person knowingly engages in the unauthorized practice of law and creates or reinforces the impression that the person is licensed to practice law, derives a benefit, or causes injury to another. (N.J. Stat. § 2C:21-22 (b) (1)-(3) (2009). The maximum sentence for a disorderly persons offense in the state is six months imprisonment (N.J. Stat. § 2C:43-8 (2009)). N.J. Stat. § 2C:43-3 (c) (2009) allows for a maximum fine of \$1,000 to be imposed in addition to or instead of imprisonment. The maximum sentence for a crime in the fourth degree is 18 months under N.J. Stat. § 2C:43-6 (a) (4) (2009). N.J. Stat. § 2C:43-6 (b) (2) (2009) provides for a maximum fine of \$10,000 in addition to or instead of incarceration.

⁵⁹ N.M. Stat. Ann. § 36-2-28 (2009) makes practicing law without a license punishable by a fine or up to \$500 and/or imprisonment of up to six months.

⁶⁰ Nev. Rev. Stat. Ann. § 7.285 (2) (a) -(c) (2009) classifies the unauthorized practice of law as a misdemeanor for a first offense within the preceding seven years, a gross misdemeanor for a second offense within the preceding seven years and a Class F felony for a third offense within the preceding seven years. Nev. Rev. Stat. Ann. § 193.130 (2) (E) (2009) makes a Class E felony punishable by not more than four and not less than one year and allows a fine to be levied of up to \$5,000. Nev. Rev. Stat. Ann. § 193.150 (1) (2009) makes the maximum punishment for a misdemeanor up to six months incarceration and/or a fine of up to \$1,000. Nev. Rev. Stat. Ann. § 193.140 (2009) makes a gross misdemeanor punishable by incarceration of up to one year and/or a fine

of up to \$2,000.

⁶¹ NY CLS Jud § 478 (2009) defines and prohibits the unauthorized practice of law and NY CLS Jud § 485 (2009) designates the offense as a misdemeanor.

⁶² Ohio Gov. Bar. Rule VII §8 (B) (2009) provides for penalties of up to \$10,000 for the unauthorized practice of law.

⁶³ 5 Oki. St. Chap. 1, Appx. 1, Art. II, Section 7 (a) (2009) prohibits the unauthorized practice of law by any person or entity. Engaging in the unauthorized practice of law is punishable as contempt of court (See, e.g., N.D. Okla. LCvR 83.6 (g) (2009)).

⁶⁴ ORS § 9.160 (1) (2007) states that only persons who are members of the bar may practice law or represent themselves as qualified to practice law. Persons who violate the statute would be subject to Injunctive relief and contempt of court as a matter of course. A person may, however, represent another in justice court in the state without being admitted to the bar (ORS § 52.060 (2007)). See also *Oregon State Bar v. Arnold*, 166 Or App 383, 998 P2d 757 (2000) (noting that an injunction against unlicensed practice of law does not apply to representation before justice courts).

⁶⁵ 42 Pa.C.S. § 2524 (a) (2009). A first violation of the statute is a misdemeanor of the third degree; a second and subsequent violations are misdemeanors of the first degree. In Pennsylvania, a misdemeanor of the third degree carries a maximum sentence of up to one year imprisonment (18 Pa.C.S. § 1104 (3) (2009)) or a fine not to exceed \$2,500 (18 Pa.C.S. § 1101 (6) (2009)). A misdemeanor of the first degree carries a maximum sentence of up to five years incarceration (18 Pa.C.S. § 1104 (1) (2009)) or a fine not to exceed \$10,000. 18 Pa.C.S. § 1101 (4) (2009).

⁶⁶ 4 L.P.R.A. § 740 (2009). The penalty for unauthorized practice of law is a fine of not less than \$5,000 and/or incarceration or not more than six months. 4 L.P.R.A. § 782 (2009).

⁶⁷ R.I. Gen. Laws § 11-27-5 (2009) restricts the practice of law to members of the bar in good standing. Persons convicted of unauthorized practice of law are subject to punishment by imprisonment of up to one year and/or a fine not to exceed \$500 with subsequent convictions resulting in incarceration not to exceed five years and/or fines not to

exceed \$5,000; Firms convicted of unauthorized practice of law are punishable by a fine of up to \$500 for a first offense and up to \$5,000 for

any subsequent offenses under the same section. R.I. Gen. Laws § 11-27-14 (2009).

⁶⁸ Rule 413, Rule 3, SCACR (g) (2009). Rule 410, SCACR (d) (2009) prohibits anyone from practicing law unless admitted to the South Carolina Bar. S.C. Code Ann. § 40-5-310 (2008) provides that "[n]o person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both."

⁶⁹ S.D. Codified Laws § 16-18-1 (2009).

⁷⁰ Tenn. Code Ann. § 23-3-103 (b)(2009). In addition, Tenn. Code Ann. § 23-3-103 (c)(2009) allows the attorney general to bring actions for injunctive relief on behalf of the state and to obtain civil penalties against those who engage in the unauthorized practice of law of up to \$10,000 per violation, as well as actions for restitution and for the cost of attorneys fees related costs of investigating and prosecuting unauthorized practice of law violations.

⁷¹ Tex. Penal Code § 38.123 (2009). The criminal penalties for the unauthorized practice of law in the State of Texas attach to instances of unauthorized practice by persons "with intent to obtain an economic benefit for himself or herself" (Tex. Penal Code § 38.123 (a) (2009)) and then only with respect to the following enumerated instances of unauthorized practice:

(1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;

(2) advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;

(3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent

fee basis with an attempted assignment of a portion of the person's cause of action; or

(5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding. Tex. Penal Code § 38.123 (a) (1)-(5) (2009).

Unauthorized practice of law as defined by the statute is punished as either a class A misdemeanor for a first offense or a felony in the third degree for subsequent offenses. (Tex. Penal Code § 38.123 (c)-(d) (2009)) But Tex. Gov't Code § 81.101 (b) (LexisNexis 2009)) states that the judicial branch retains "the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law." Therefore, injunctive relief and contempt of court would also be available as a matter of course for other instances of unauthorized practice that do not rise to the level of criminal offenses. (See, e.g., *Newton v. Delespine*, 2006 Tex. App. LEXIS 10361 (Tex. App. Tyler Dec. 1 2006) (finding that the activities of a "jailhouse lawyer" to be the unauthorized practice of law); *State Bar v. Cortez*, 692 S.W.2d 47, 1985 Tex. LEXIS 922, 28 Tex. Sup. Ct. J. 407 (Tex. 1985) (interviewing clients and preparing immigration forms constitutes the unauthorized practice of law that may be the appropriate subject of injunction); *Davies v. Unauthorized Practice Comm.*, 431 S.W.2d 590 1968 Tex. App. LEXIS 2082 (Tex. Civ. App. Tyler 1968). (The giving of legal advice on and preparin^g trusts, contracts, taxes, and assisting in the formation of a corporation by someone who is not licensed to practice law can appropriately result in a permanent injunction preventing the person from engaging in the unauthorized practice of law.)

⁷² Utah Code Ann. § 78A-9-103 (1) (2009) prohibits the unauthorized practice of law and provides for the enforcement of the prohibition enforced "by any civil action or proceedings instituted by the Board of Commissioners of the Utah State Bar." Utah Code Ann. § 78A-9-103 (2) (2009).

ⁿ Va. Code Ann. § 54.1-3904 (2009).

⁷⁴ 4 V.I.C. § 443 (b) (2009) provides for injunctive relief and a fine of up

to \$500 for each violation.

⁷⁵ 3 V.S.A. § 127 (b) (2009) provides that the unauthorized practice of any regulated profession (not just law) is subject to injunction and civil penalty of up to \$1,000. 3 V.S.A. § 127 (c) (2009) also makes the unauthorized practice of a regulated profession a criminal offense subject to criminal prosecution with a maximum penalty of a fine of up to \$5,000 and/or imprisonment for up to one year.

⁷⁶ Rev. Code Wash. (ARCW) § 2.48.180 (3) (a)-(b) (2009) makes a first offense punishable as a gross misdemeanor and any subsequent offense punishable as a class C felony. Rev. Code Wash. (ARCW) § 9.92.020 (2009) sets the punishment for a gross misdemeanor as a fine not to exceed \$5,000 and/or imprisonment for up to one year. Rev. Code Wash. (ARCW) § 9A.20.021 (1) (c) (2009) provides the maximum sentence for conviction of a class C felony as incarceration for up to five years and/or a maximum fine of \$10,000.

⁷⁷ Wis. Stat. § 757.30 (1) (2009) makes the unauthorized practice of law punishable by a fine of not less than \$50 and not more than \$500 and/or imprisonment for up to one year and in addition may be punished for contempt.

⁷⁸ W. Va. Code § 30-2-4 (2009) makes the unauthorized practice of law a misdemeanor punishable by a fine of up to \$1,000. The statute does not provide for incarceration as a punishment but does refer to the offense as a misdemeanor, which makes the unauthorized practice of law a criminal offense.

⁷⁹ Wyo. Unauth. Prac. Rule 9 (b) (1). Criminal contempt is punishable by a fine not to exceed \$5,000 and/or imprisonment for up to three months. Wyo. Unauth. Prac. Rule 9 (i) (9).

⁸⁰ A copy of the survey from is available at <http://www.abanet.org/cpr/clientpro/2009-survey.pdf>. (Last visited November 15, 2010)

⁸¹ AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON CLIENT PROTECTION, 2009 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES (May 2009) available at <http://www.abanet.org/cpeclientpro/09-upl-survey.pdf> (Last visited November 14, 2010)

⁸² *Id.* at 1.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1-2.

⁸⁶ *Id.* at 2.

⁸⁷ See e.g., Linda Galler, *Problems in Defining and Controlling Unauthorized Practice of Law*, 44 Ariz. L. Rev. 773, 777 (2003) (Noting that accountants and accounting firms often engage in UPI, despite federal regulations under Circular 230 that permit CPAs, enrolled agents, and enrolled actuaries to practice before the IRS such as when in transactional planning accountants give an opinion as to probable tax consequences).

⁸⁸ Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 Geo. J. Legal Ethics 719, 723.

" *Id.*

⁹⁰ Soha Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 Wash & Lee L. Rev. 1903, 1916.

⁹¹ http://www.abanet.org/cpr/model-def/model_def_definition.html (Last visited November 14, 2010).

Are Lock-In Contracts for Heating Oil Unconscionable Under the Uniform Commercial Code? A Teaching Exercise in Contract Law

by

Sharlene A. McEvoy*

ABSTRACT

There has been a trend in recent years for heating oil companies to encourage customers to "lock in" a price for a season as a hedge against an increase in oil prices. This paper analyzes the issue in light of the unconscionable contract provision of the Uniform Commercial Code.

INTRODUCTION

In the past few years the cost of home heating oil has increased dramatically as the price of a barrel of oil skyrocketed to nearly \$150.00 a barrel during the summer of 2008.¹

Because some analysts had predicted that oil might go as high as \$200.00 per barrel, many consumers became anxious about their ability to pay for home heating oil during the winter of 2008-2009.

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